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No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has a student-athlete stated a claim under Section 1 of the Sherman Act where he alleges that he has been injured by an agreement among members of the NCAA not to allow any student-athlete to play a sport for any NCAA school if the student-athlete has (i) unsuccessfully entered a professional draft in that sport or (ii) agreed to allow a lawyer to represent him in discussions with a professional team, even where the athlete was not drafted, never signed a professional contract, and never accepted any payment for his services?

2. In an antitrust case challenging an agreement among competitors under the Rule of Reason, may a court, without any evidence in the record, conclude that the agreement is procompetitive based solely on the assertions in the defendant's legal memoranda?

3. Did the court of appeals err in reversing the district court's refusal to find petitioner's class claim for injunctive relief moot, based on the appellate court's assessment of facts that were neither presented to, nor found by, the district court?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, the University of Notre Dame was originally a party in the district court, but was voluntarily dismissed from the case on August 30, 1990.

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In The

Supreme Court of the United States

October Term, 1992

No. 92-

BRAXSTON BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1081, and is set forth in Petitioner's Appendix ("Pet. App.") at 1a-40a. The opinion of the United States District Court for the Northern District of Indiana denying petitioner's request for a preliminary injunction is reported at 746 F. Supp. 850, and is set forth in the Appendix at 41a-68a. The subsequent opinion of the district court granting respondent's motion to dismiss, and entering judgment in its favor, is not reported and is set forth in the Appendix at 69a-78a.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on October 13, 1992. A petition for rehearing and suggestion for rehearing *in banc* were denied on December 10, 1992. *See* 79a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

This case involves the application of the antitrust laws to the Rules of the National Collegiate Athletic Association ("NCAA"), an association of the major universities that sponsor intercollegiate athletics in the United States. Petitioner's complaint alleges a horizontal agreement among the NCAA members not to deal with student-athletes who enter, but are not selected in, the draft for professional sports, or who retain an agent to help them make informed decisions about whether to remain in college or become professional athletes. A divided panel of the Seventh Circuit affirmed the district court's decision dismissing the complaint on the ground that these allegations do not state a claim under the Sherman Act. In doing so, the Circuit Court ruled that, notwithstanding this Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), student-athletes cannot bring an antitrust challenge to agreements by intercollegiate athletic associations concerning their eligibility. In addition, even though this case was decided on a motion to dismiss and no evidence concerning the Rules' competitive impact had been presented by either side, the majority held that the alleged procompetitive impacts of the NCAA's Rules outweigh any anticompetitive effects.

This petition raises the question of whether this Court's decision in *NCAA v. Board of Regents* allows only the participants in intercollegiate associations to bring antitrust claims challenging the anticompetitive effects of agreements among the member schools, or whether students, who are not parties to such agreements, can also sue under the antitrust laws to challenge intercollegiate agreements that directly injure them. It also raises the question of whether it is proper for a court, when presented with allegations that competitors have collectively agreed to restrain competition, to decide that the alleged procompetitive effects of the agreement outweigh its anticompetitive effects under the Rule of Reason test, without any factual inquiry. Because the decision below is contrary to precedents of this Court on both of these issues, and because both issues have broad implications beyond this case, this Court should grant review.

1. The NCAA No-Draft and No-Agent Rules.

The NCAA is an association of approximately 1,017 colleges and universities whose purpose is to promote intercollegiate athletics in the United States, and it is the dominant association of colleges and universities that engage in intercollegiate athletics. The NCAA has adopted a series of substantive rules that relate to all intercollegiate sports. It also has rules and procedures for the enforcement of those rules, and it imposes sanctions against NCAA members who do not adhere to them. *See* Pet. App. 42a.

In this case petitioner, Braxston Lee Banks, challenged two of the eligibility Rules established by the members of the NCAA as horizonal agreements to restrain competition in violation of Section 1 of the Sherman Act. The first Rule is Rule 12.2.4.2, known as the "no-draft" Rule, which provides that a player becomes ineligible for participation in a particular intercollegiate sport if that player asks that his or her name be placed on a list of players available for the professional draft in that sport. *See id.* at 42a n.1 This "no-draft" Rule applies even if the player asks that his or her name be withdrawn before the

draft starts, even if the player goes through the draft but is not chosen, or even if the player is drafted, but does not sign a professional contract.[1]

The no-draft Rule, however, does not apply to a player who is a paid professional athlete in one sport, but who wishes to play intercollegiate athletics in another. In addition, the Rule does not apply where the student-athlete is drafted by a professional team without the student actually requesting to be placed in the draft. For example, both Major League Baseball and the National Hockey League allow franchises to draft student-athletes without requiring that the students affirmatively submit their names for the draft, and the students drafted in this way retain their NCAA eligibility despite the no-draft Rule (assuming that they do not sign a professional contract or are otherwise made ineligible). The Rule does, however, affect participants in NCAA intercollegiate football because the National Football League ("NFL") requires that individuals apply to be considered in the draft.

The second rule is Rule 12.3, known as the "no-agent" Rule. It provides that a player is ineligible for participation in any intercollegiate sport in which that player agrees (orally or in writing) to be represented by an agent, including an attorney, for the purpose of marketing that player's athletic ability or reputation in that sport. *See id.* at 43a n.2. The no-agent Rule applies even if the player receives no money or financial benefit from the agent or anyone else, even if the agent is a close friend or family member, and even if the agent has not charged, and agrees not to charge, the player any fee for the representation. There is a limited exception for consultation with lawyers, but even that exception is

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[1] At one point, the majority opinion below erroneously describes the no-draft rule as "denying a college football player the right to play professional football (entering the NFL draft) and then return to college football." 20a. As noted above, the Rule applies even if the player is *not* drafted, and never plays professionally. It is this application of the Rule that is the basis for petitioner's challenge here.

available only for advice concerning a proposed contract, and it does not apply if the lawyer is present during contract negotiations or has any direct contact with any team on behalf of the player. *Id.* Like the no-draft Rule, the no-agent Rule does not apply to a player who has retained an agent for one sport, but who wishes to play in another sport.

2. Effect of the NCAA Eligibility Rules on Petitioner.

Petitioner entered the University of Notre Dame, which is a member of the NCAA, in September 1986 on a full athletic scholarship, which was worth approximately $16,000 a year in 1990. He played running-back for Notre Dame for three years, but sat out his senior year due to a knee injury. Because he had played only three seasons at Notre Dame, petitioner was eligible to play again during the 1990 season. *See* Pet. App. 2a, 44a-45a.

In February 1990, petitioner applied to renew his grant-in-aid and continue his studies at Notre Dame. Notre Dame orally approved his application, which would have enabled him to play football for Notre Dame during the 1990 season. But in March petitioner declared his intent to enter the April 1990 NFL draft, which was held on April 22-23, 1990. In addition, after declaring his intent to enter the draft, petitioner retained an attorney to represent him. Of the 38 players who entered the 1990 draft with NCAA eligibility remaining, twenty, including petitioner, were not drafted by any team. After the draft, petitioner continued to seek a contract with a professional team, but was not successful. At no time did any team or agent pay petitioner any compensation, although he did receive travel reimbursements in connection with certain tryouts. Because of his lack of success, petitioner sought to return to Notre Dame to play an additional year of collegiate football, but was precluded from doing so by the NCAA's no-draft and no-agent Rules. *See id.* at 46a-49a.

3. Proceedings in the District Court.

On August 9, 1990, petitioner filed this action against the NCAA in the Northern District of Indiana, South Bend Division, alleging that both the no-draft and no-

agent Rules violated the Sherman Antitrust Act because they unreasonably restrained trade and commerce among the states. Subject matter jurisdiction was based on 15 U.S.C. §§ 15, 26. The original complaint had two causes of action. The first was on behalf of petitioner alone, and it sought injunctive relief restoring him to eligibility for another football season at Notre Dame. The second was a class claim brought under Rule 23(b)(2), seeking an injunction on behalf of present and future class members against enforcement of both Rules. Notre Dame was named as a defendant solely with respect to the petitioner's claim to restore his eligibility. *See* Pet. App. at 50a-51a.

Because football practice was to start at Notre Dame on August 17, petitioner filed a motion for a preliminary injunction with his complaint, supported by affidavits attesting to the fact that he had never entered into a professional contract or received compensation for playing professional football, and describing the unsuccessful efforts that petitioner and his counsel had made to resolve the dispute without litigation. His accompanying memorandum of law relied principally on this Court's ruling in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), for the propositions that the NCAA was subject to the antitrust laws and that the Rule of Reason was the test under which its agreements should be evaluated.

Notre Dame took no position on the motion, but the NCAA vigorously opposed it. First, the NCAA argued that its eligibility Rules are not subject to the Sherman Act because they "regulate the non-commercial activities of an organization dedicated to fostering amateurism in college sports." Pet. App. 53a. The district court rejected this argument, concluding that *Board of Regents* makes such Rules subject to scrutiny under the antitrust laws, albeit under the Rule of Reason rather than a *per se* analysis. *Id.* at 53a-56a. The district court also rejected the NCAA's claims that petitioner could not show "antitrust injury" and had failed to identify a market or an anticompetitive effect of the Rules. *Id.* at 57a-63a. It concluded that petitioner had "posited a credible anticompetitive effect" in that "the

'no-draft' Rule will deter better college football players from testing the waters of professional football for fear of finding themselves in the no-man's land in which Mr. Banks has placed himself. Accordingly, better players will remain in school and out of the NFL draft, enhancing the NCAA's already profitable market." *Id.* at 63a.

Finally, the NCAA argued that any anticompetitive effects of the Rules were outweighed by their procompetitive effects. Although the NCAA submitted four affidavits in support of its opposition, none of them offered any factual basis for the asserted procompetitive effects of the Rules, nor did they show that the Rules were reasonably necessary to advance their asserted goal of assuring amateurism in college sports. Nonetheless, the district court accepted the proposition that the "articulated procompetitive effects" argued in the NCAA's legal memorandum and at oral argument "outweigh[] the anticompetitive effects," and, therefore, denied the preliminary injunction on the grounds that petitioner had not established sufficient likelihood of success on the merits. *Id.* at 63a-67a.

On August 30, 1990, petitioner filed an Amended Complaint which eliminated any claim for injunctive relief for himself, because he no longer desired to play intercollegiate football or to return to Notre Dame, from which he had graduated that month. *See* Pet. App. 80a-91a.[2] The Amended Complaint contains two counts. The first continues to seek injunctive relief on behalf of the same class that petitioner sought to represent when he filed his original complaint, except that he no longer seeks injunctive relief for himself. The second claim, brought solely on behalf of petitioner, seeks treble damages under the Sherman Act, principally based on the loss of the

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[2] In addition to questions of personal preference and a need to get on with his life, petitioner's decision reflected the fact he was barred from returning to play football by NCAA Rule 14.2, which limits an athlete's intercollegiate eligibility to the five years after he begins his education. *See id.* at 4a-5a.

$16,000 a year athletic scholarship, as a result of being declared ineligible to play football again. Since he no longer sought reinstatement, petitioner voluntarily dismissed the action as to Notre Dame.

The Amended Complaint alleged that the no-draft and no-agent Rules restrain competition in three ways. First, the Rules restrain competition among NCAA members for student-athletes by foreclosing institutions from seeking to attract top prospects, and players from choosing institutions, based on the school's promise to give its athletes the opportunity to investigate their chances in professional sports without forfeiting their college eligibility if unsuccessful. *See id.* at 85a-86a, Amended Complaint ¶ 22(a).

Second, the Rules restrict the ability of college athletes, like Mr. Banks, who have unsuccessfully investigated opportunities outside the NCAA, to play for NCAA member universities that would otherwise be willing to "waive or change" the Rules. *See id.* at 86a, Amended Complaint ¶ 22(b). Absent these Rules, Notre Dame would have been free to allow petitioner to return, and it was only the group boycott enforced by the NCAA that prevented it from doing so.

Third, the Rules restrain competition between the NCAA and the NFL for those college athletes who are considered potential, but uncertain, prospects for professional sports. Under these Rules, student athletes who explore their marketability in professional sports are penalized by forfeiting all athletic scholarships and any further opportunity to exhibit their skills in the NCAA. *See id.*, Amended Complaint ¶ 22(c).

In lieu of answering, the NCAA moved to dismiss under Rule 12(b)(6). The motion had two parts, the first attacking the claim for injunctive relief, and the second arguing that both causes of action should be dismissed on the merits. As to the claim for injunctive relief, the NCAA first argued that, because petitioner was no longer seeking to play intercollegiate football, he lacked constitutional standing and was not entitled to injunctive

relief under the antitrust laws. *Id.* at 72a. In his opposition, petitioner pointed out that the class had standing to seek injunctive relief, under both the Constitution and the antitrust laws, and the real question was whether petitioner, who had properly alleged future injury and sought class certification in his original complaint, could be a representative for the class. This issue, petitioner argued, was not then before the court, but should be decided only on a motion for class certification, which had been deferred by agreement of the parties and with the approval of the court. *Id.*

The district court agreed. It noted that, in appropriate circumstances, a plaintiff who had a live claim at the time suit is filed, but whose own claim later became moot, may still serve as representative for a class of persons that still face the threat of injury. Accordingly, the district court concluded that, because the motion for class certification had been deferred, it was not appropriate to decide the issue at this stage of the proceedings. *See id.* at 74a-75a.[3]

In its second argument, the NCAA claimed that petitioner had not alleged an antitrust injury and that, in any event, its Rules were reasonable and should be upheld. *Id.* at 72a. Once again, the NCAA did not offer any evidence to substantiate its claim that the Rules were essential to preserve the procompetitive aspects of intercollegiate sports. Nevertheless, the district court granted the NCAA's motion under Rule 12(b)(6) and dismissed the complaint. The court relied on essentially the same grounds as those underlying its decision on the preliminary injunction: that "the NCAA has demonstrated significant procompetitive effects of its no draft rules" and petitioner did not allege "anticompetitive effects to overcome this positive impact and show an adverse market impact." *Id.* at 77a.

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[3] This Court reaffirmed the principles in the cases relied upon by the district court concerning the "relation back" doctrine for class actions in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 1667 (1991).

4. Proceedings in the Court of Appeals.

The Seventh Circuit, in an opinion written by Judge Coffey and joined by Senior District Judge Grant of the Northern District of Indiana, affirmed the dismissal of the complaint in its entirety. The panel unanimously held that the claim for injunctive relief should have been dismissed for lack of standing, although it acknowledged that deciding the issue was not necessary in light of its disposition of the merits. *Id.* at 27a. It concluded that the decisions concerning the "relation back" doctrine for class actions were not applicable in this case because petitioner had not "been diligent in filing his claim shortly after discovering that he had failed to be selected for the draft or as a free agent." *Id.* at 9a. The Court of Appeals made this finding despite the absence of any factual record on this issue, and despite the district court's conclusion that it was inappropriate to address the issue because of the agreement to defer the class certification motion.

On the merits, the majority concluded that the complaint should be dismissed because "it failed to allege an anticompetitive effect in any identifiable market." *Id.* at 11a, 26a. Although the majority suggested that this was due to a pleading defect, it refused to identify the allegations that would have cured the purported defect, and indicated that additional allegations would not have altered its decision. *See id.* at 12a, 15a n.10, 22a-26a &n.20. Instead, the majority quoted from paragraph 22 of the Amended Complaint, which lays out three separate markets which the NCAA's Rules constrain. *Id.* at 13a-14a It declared that none of the constraints identified could be considered to be a restraint on trade because the NCAA Rules purport to "encourage the educational pursuits of student-athletes" and "prevent commercialism." *Id.* at 15a-16a. Moreover, the majority proclaimed: "None of the NCAA rules affecting college football eligibility restrain trade in the market for college football players" because the NCAA exists "to provide an opportunity for competition among amateur students pursuing a collegiate education." *Id.* at 17a. The majority categorically rejected the suggestion that NCAA schools could be analogized to

purchasers of labor in a market for college athletes as a "cynical view" that was inconsistent with the NCAA's professed goals. *Id.* at 20a-24a. It also spurned the idea that competition for players between the NCAA and NFL represents a cognizable market under the Sherman Act on the grounds that "the NCAA regulations preserve the bright line of demarcation between college and 'play for pay' football." *Id.* at 17a-18a, 19a-20a.

But the majority did not end there. Petitioner's principal assignment of error had been that the district court had made factual findings under the Rule of Reason on a motion to dismiss, with no discovery and no evidence in the record. *Id.* at 10a. Because the majority maintained that the district court's decision was based on the failure to allege an anticompetitive impact of the Rules, it dismissed petitioner's claim as "immaterial," but nonetheless observed that "[w]e are unconvinced that the record in this case requires further development in order to determine whether the NCAA rules have a procompetitive effect." *Id.* It then proceeded to conduct its own assessment under the Rule of Reason test. *See id.* at 16a-22a.

Despite the absence of any factual record, the majority made numerous findings, proclaiming, as if it had been proven, the following:

- The no-draft Rule "has no more impact on the market for college football players than other NCAA eligibility requirements such as grades, semester hours carried, or requiring a high school diploma." *Id.* at 17a
- The no-draft Rule is a "desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'" *Id.* at 18a (quoting *Board of Regents*, 468 U.S. at 123 (White, J. dissenting)).
- The elimination of the no-draft and no-agent Rules "would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a

> 'minor-league' farm system . . . for professional football in the NFL." *Id.* at 2a.

Based upon these and other findings, the majority declared that the no-agent and no-draft rules, and all other NCAA eligibility rules, "are vital . . . to preserve the amateur status of college athletics." *Id.* at 21a. As support for these findings, the majority opinion cited such extra-record sources as the sports pages of *USA Today*, the *Chicago Tribune*, and the *Milwaukee Journal*. *See id.* at 19a n.13, 21a n.15, 22a n.17.

Judge Flaum dissented on the merits. He reviewed the Amended Complaint and found that it properly alleges harm to competition in the market for college football players. Focusing on the no-draft Rule, Judge Flaum observed that it restrained competition among colleges in recruiting the most promising football players when they enter college:

> If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football market. It categorically rules out a term of employment that players, the suppliers of labor in that market, would find advantageous.

Id. at 29a-30a.

He also observed that the no-draft Rule distorts the market for athletes leaving college in its effect on "'bubble players'" -- "athletes who are excellent competitors at the collegiate level, but for various reasons are considered less than certain NFL prospects." *Id.* at 30a-31a. The Rule discourages these players from testing the waters and "permits colleges to squeeze out of their players one or two more years of service." *Id.* at 31a. In light of these direct restraints on competition, Judge Flaum concluded

that "there can be no doubt that Banks has alleged an anticompetitive effect in a relevant market." *Id.* at 32a.

Judge Flaum also rejected the majority's decision to adjudicate the reasonableness of the challenged rules on a motion to dismiss, although he was careful to make clear that he was not deciding whether petitioner would prevail. He observed: "A lively debate [over the effect of the Rules] has arisen among those who have already considered the matter. I opt not to join the fray here, for I think it unwise to weigh pro- and anticompetitive effects under the rule of reason on a motion to dismiss." *Id.* at 36a (citations omitted).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS CONTRARY TO THE ANTITRUST DECISIONS OF THIS COURT AND PRESENTS IMPORTANT ISSUES CONCERNING THE APPLICATION OF THE ANTITRUST LAWS.[4]

Although the majority asserted that the dismissal of the complaint was based on a failure to plead properly, its reasoning leaves no doubt that the decision actually rested on the premise that student-athletes -- regardless of how their complaints are drafted -- cannot challenge any NCAA eligibility Rules under the antitrust laws. Indeed, on rehearing, the NCAA effectively conceded that the problem was not a defect in the pleading or inartful

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[4] Petitioner does not contend that the third question presented, relating to the propriety of the dismissal of the injunctive claim on mootness grounds, is itself worthy of review. However, because that ruling is entirely fact based, but without any basis in the record to sustain it, it is erroneous as a matter of law. Because it can be dealt with rather easily, along with the merits, review should be granted on it also, as the Court did in similar circumstances in *County of Riverside v. McLaughlin*, 111 S. Ct. at 1667.

drafting.[5] That concession is plainly correct, since even the majority recognized that the Amended Complaint alleges "a restraint on the market of college football players, college institutions who are members of the NCAA, and perhaps an NFL player recruitment market." Pet. App. 26a.[6]

The majority ruling can only be read as creating a special immunity for intercollegiate agreements directed at students, such as the NCAA Rules, and holding that, notwithstanding this Court's decision in *Board of Regents*, (1) "eligibility rules" that restrict the terms on which schools compete in recruiting student-athletes are immune from challenge under the antitrust laws; and (2) even if it such agreements were subject to antitrust scrutiny under the Rule of Reason, a defendant can prevail simply by asserting a procompetitive effect from its agreements, without having to prove it in court with admissible evidence.

Both propositions are in conflict with *Board of Regents* and other antitrust decisions. Moreover, both propositions have broad implications which are not limited to the NCAA or intercollegiate athletic competition. The immunity created by the decision below for intercollegiate agreements with "noncommercial" goals is equally applicable to agreements among colleges in other areas, such as scholarships, grants, and financial aid. Similarly, the Seventh Circuit's conclusion that the application of the Rule of Reason can properly be decided on a motion to dismiss by accepting a defendant's assertions that a restraint on trade enhances competition, without any

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[5] *See* Appellee's Answer to Appellant's Petition for Rehearing With Suggestion for Rehearing En Banc at 9-10.

[6] In its opinion on the preliminary injunction, the district court was even more explicit, acknowledging that the complaint alleged "a credible anticompetitive effect" because "[t]he 'no-draft' rule will deter better college football players from testing the waters of professional football" so that they "will remain in school and out of the NFL draft, enhancing the NCAA's already profitable product." Pet. App. 63a.

factual inquiry into the validity of the claim, extends to any antitrust challenge brought under that Rule, and not simply those challenging rules of the NCAA.

I. INTERCOLLEGIATE AGREEMENTS THAT RESTRICT ELIGIBILITY OF STUDENT-ATHLETES ARE NOT IMMUNE TO ANTITRUST CHALLENGE.

As this Court observed in *NCAA v. Board of Regents*, telecast rights are not the only area in which colleges compete. The schools of the NCAA also "compete against each other to attract . . . *fans and athletes*." *Id.* at 99 (emphasis added). But subsequent lower court decisions, including the decision here, have refused to apply the *Board of Regents* analysis to NCAA Rules restricting competition among schools for athletes. The first, and principal holding, of the majority decision in this case is that intercollegiate agreements in which NCAA schools collectively fix the terms on which they compete for student athletes are not subject to the antitrust laws at all. Under this view, agreements regarding such competition cannot be challenged under the Sherman Act on the grounds that the NCAA seeks to "prevent commercialism," there is no "market" for collegiate athletes, and the relationship between schools and student-athletes cannot be analogized to purchasers of labor. Pet. App. 15a-16a, 18a-21a.

This holding is fundamentally at odds with *Board of Regents* and other decisions of this Court in two respects. First, in *Board of Regents* this Court reaffirmed that "[t]here is no doubt that the sweeping language of § 1 [of the Sherman Act] applies to" nonprofit organizations and associations such as the NCAA. 468 U.S. at 100 n. 22. Indeed, this Court has consistently rejected efforts to create categorical exemptions from the Sherman Act for professional or nonprofit organizations because they serve noncommercial goals or for some other policy reason. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (rejecting contention that attorneys, as part of a "learned profession" are not subject to the antitrust laws); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-63 (1986)

(rejecting argument that dentists' rules on withholding x-rays could be justified by moral and ethical considerations of dental profession). The Seventh Circuit's decision, however, creates precisely the type of broad exception from antitrust laws that this Court has rejected by providing that intercollegiate agreements restraining competition among schools for student-athletes are immune from scrutiny under the Sherman Act simply because they purport to serve noncommercial interests.

The significance of this departure from this Court's prior decisions rejecting such immunity for organizations like the NCAA is underscored by this Court's observation in *Board of Regents* that the NCAA is organized to maximize revenues for its members, and that its agreements have a significant potential for anticompetitive effects. 468 U.S. at 100 n.22, 104-05.[7] Indeed, this Court has long recognized that agreements among competitors on the terms on which they will purchase services can have substantial anticompetitive effects, even when the restraints are indirect. *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-84 (1982) (alleged agreement among health insurers to restrain trade by denying health care benefits for psychologists states a claim under the Sherman Act). The Circuit Court's contrary view that NCAA agreements on student-eligibility are outside the scope of the antitrust laws rests, as Judge Flaum observed, on "an outmoded image of intercollegiate sports that no longer jibes with reality." Pet. App. 38a. The no-draft and no-agent Rules are, in antitrust parlance, classic examples of a group boycott or concerted refusal to deal that are ordinarily condemned as *per se* violations of the Sherman Act. *See, e.g. Radiant Burners v. Peoples Gas Light and*

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[7] *See also* Goldman, *Sports and Antitrust: Should College Athletes Be Paid To Play?*, 65 Notre Dame L.R. 206, 209-212 (1990) (NCAA operates as a cartel in which rules restrict competition for athletes to the benefit of schools, coaches, and recruiters, and cause misallocation of resources that harms consumer welfare); Koch, *The Economic Realities of Amateur Sports Organization*, 61 Ind. L.J. 9 (1985) (describing NCAA as an economic cartel).

Coke Co., 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). As with the NCAA telecast plan at issue in the *Board of Regents* case, the anticompetitive consequences of such horizonal agreements "are apparent. Individual competitors lose their freedom to compete." 468 U.S. at 468. But the Circuit Court refused to apply these principles in the decision below and, instead, held that members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity -- as long as they are directed at student-athlete eligibility.

Secondly, the Seventh Circuit's decision is contrary to *Board of Regents* because it rests on a misreading of a portion of that decision in which this Court stated that "[i]t is reasonable to assume that *most* of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." 468 U.S. at 117 (emphasis added). The Circuit Court transformed this qualified statement into a conclusion that: "*None* of the NCAA rules affecting college football eligibility restrain trade in the market for college players." Pet. App. 17a (emphasis added). Other decisions have given the same broad reading to the *Board of Regents* opinion's discussion of eligibility rules. In *Gaines v. NCAA*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990), the court quoted that same passage from the *Board of Regents* opinion to support its conclusion that NCAA eligibility rules are not subject to scrutiny under Section 2 of the Sherman Act. Similarly, the Fifth Circuit, while it has not gone as far as the Seventh Circuit majority, has also interpreted the same passage from *Board of Regents* as having "strongly indicated" that eligibility rules are to be upheld against all antitrust challenges. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (rejecting challenge to restrictions on athlete compensation on motion to dismiss).

These decisions plainly misread *Board of Regents*. This Court's observation that *most* NCAA eligibility rules would be upheld as reasonable and necessary implicitly acknowledged that *some* eligibility rules may run afoul of

the antitrust laws when tested under the Rule of Reason. Indeed, at the heart of the *Board of Regents* holding is the recognition that the NCAA has gone beyond adopting rules required to preserve amateurism and, in the name of "amateurism," has imposed additional restrictions that unreasonably restrain trade in violation of the Sherman Act. *See Board of Regents*, 468 U.S. at 119 (while NCAA imposes a variety of restrictions that are designed to preserve amateurism, its television plan is not even arguably tailored to serve this purpose). For this reason, particular rules, including "eligibility rules," must be scrutinized under the Rule of Reason to determine whether they are genuinely necessary to promote competition, or only serve the NCAA's interests in restricting competition. Some eligibility rules, including the no-draft and no-agent Rules, are more closely (if not exclusively) related to the commercial and competitive interests of NCAA universities than to defining collegiate athletics as a unique product for consumers.[8] But under the Seventh Circuit's decision here, *every* rule relating to eligibility is wholly outside the scope of the antitrust laws, no matter how harmful it is to competition. This conclusion cannot be squared with this Court's decision in *Board of Regents* and other cases, which make clear that compacts among competitors, regardless of how they are labelled, are subject to scrutiny to under the Sherman Act.

In addition to being contrary to *Board of Regents*, the Seventh Circuit's decision also warrants review because its reasoning potentially immunizes from antitrust scrutiny a myriad of other intercollegiate agreements with serious anticompetitive effects. In the opinion below, the Seventh Circuit adopted the view that noneconomic values pursued by educational institutions like the NCAA presumptively

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[8] *See also* Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N. Dak. L. Rev. 215, 217-18 (1991) (arguing that many NCAA eligibility rules are not concerned with amateurism but "with how much it would cost [NCAA] institutions if they had to competitively reward athletes for their skills," and that the rules go farther than necessary to protect amateurism).

outweigh, or justify disregarding, the anticompetitive effects of intercollegiate agreements -- a premise that was rejected by the majority in *Board of Regents*. *Compare* 468 U.S. at 104 (restraint must be judged based upon its impact on competition), *with* 468 U.S. 134-35 (White, J., dissenting) (noneconomic educational values should be considered); *see also National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 & n.16 (1978) (inquiry under Sherman Act "is confined to a consideration of competitive conditions"). This reasoning is not limited to the NCAA, or even to intercollegiate athletics. Numerous intercollegiate associations and agreements exist in which schools develop rules and understandings concerning the manner in which colleges and universities compete in areas such as scholarships, financial aid, and attracting students. Like the NCAA, these associations and their agreements purport to exist for the purpose of promoting education and preventing commercialism -- but they also can have serious anticompetitive effects on students. Thus, the Seventh Circuit's holding that student-athletes cannot challenge NCAA Rules could also exempt from antitrust scrutiny many other intercollegiate agreements that purport to be motivated by noncommercial concerns.

A case-in-point is *United States v. Brown University*, 805 F. Supp. 288 (E.D. Pa. 1992), *appeal pend'ng*, No. 92-1911 (3rd Cir.), in which the Department of Justice charged that an agreement among universities that included standards by which they will determine financial need violated the antitrust laws. The district court rejected the defendant university's claim that, because the financial aid agreement was motivated by charitable and educational -- rather than "commercial" motives -- the agreement was not subject to the antitrust laws. 805 F. Supp. at 296-98. But under Seventh Circuit's reasoning in this case, intercollegiate agreements on eligibility for financial aid would appear to be just as immune from challenge by the students as agreements on eligibility for college athletes. Indeed, the need for antitrust scrutiny is, if anything, even greater with respect to agreements like those at issue here,

in which the motives of the universities participating in such agreements are more obviously commercial, and the profits potentially large.

The immunity for such intercollegiate agreements created by the Seventh Circuit is particularly troublesome because it denies the protection of the antitrust laws to those who have no other effective means of challenging the anticompetitive aspects of agreements that directly affect them. Under *Board of Regents*, NCAA members have the right to challenge the NCAA Rules under the antitrust laws, even though they participate in the adoption of the Rules and may reap their benefits. In contrast, the Seventh Circuit's decision denies this right to student-athletes who have no role in formulating the Rules.

In the proceedings below, the NCAA argued it was proper to deny student-athletes the right to challenge NCAA agreements because the injury imposed on them by rules restricting the terms on which schools compete for their services is not the type of "antitrust injury" required for standing under the Sherman Act. This claim is clearly inconsistent with the decisions of this Court holding that agreements among competitors concerning the terms upon which they will compete for labor and other services give rise to claims under the antitrust laws. In the case most closely analogous to this action, *Radovich v. National Football League*, 352 U.S. 445 (1957), a professional football player brought an antitrust action alleging that, in an effort to discourage players from moving from the NFL to competing leagues, the NFL teams agreed to use a standard player contract which prohibited a player from switching to another club. *Id.* at 448-49. This Court held that the complaint alleged an unreasonable restraint, with the requisite antitrust injury, and that the player was entitled to an opportunity to prove his charges at trial. *Id.* at 453-54.

Since *Radovich*, numerous decisions have affirmed that "[t]he purposes of the antitrust laws are served when employers are prevented from tampering with the employment market" by controlling the terms on which they will compete for purchasing services. Pet. App. 33a;

see, e.g. Nichols v. Spencer International Press, Inc., 371 F.2d 332, 334-36 (7th Cir. 1967).[9] As the leading treatise on antitrust law puts it in describing whether employees have the antitrust injury required to challenge agreements among employers to control their terms of employment:

> It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned -- perhaps the only persons concerned -- could not challenge the restraint. . . . The standing of such plaintiffs is undoubted and rarely challenged.

II P. Areeda and D. Turner, *Antitrust Law* ¶ 338c, at 199-200 (1978). The decision below reflects just such a "perverse" holding by making NCAA agreements restricting competition for student-athletes immune from challenges by the very individuals whose opportunities the agreements are designed to restrict.[10]

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[9] These decisions have included rulings that players may challenge agreements designed to restrict competition between amateur and professional sports as contrary to the antitrust laws. *See Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061-67 (C.D. Cal. 1971) (NBA rule prohibiting use of players who have been out of high school less than four years is concerted refusal to deal which violates antitrust laws); *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977) (hockey league rule against hiring players until they reach the age of twenty is a group boycott in illegal restraint of trade under the Sherman Act); *Boris v. USFL*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) (granting preliminary injunction against USFL prohibition on recruiting intercollegiate athletes with remaining eligibility).

[10] The decisions the NCAA relied upon below to support its claim that the injury identified in petitioner's complaint is not an "antitrust injury" are inapposite. Its principal authority below, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), dealt with the threat of lost profits due to increased competition following a merger and held that such a claim does not state an antitrust injury. A second decision cited by the NCAA below, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), stands only for the proposition

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The majority opinion clearly precludes students from challenging any of the NCAA's eligibility rules even if, for example, they required students to pay back all of their scholarships if they became professional athletes before their eligibility expired. Its broad statements endorsing the NCAA's Rules, however, also appears to preclude an NCAA member school from going to court if the NCAA declared one of its star players to be ineligible based on a Rule that the school alleged violated the antitrust laws. Moreover, it also appears to foreclose an antitrust action by the NFL or, more likely, a new league, challenging the NCAA's eligibility Rules on the ground that they prevented it from competing for athletes with NCAA member schools. If such actions are not within the antitrust laws, it would have to be because of some unarticulated difference between the agreement that was successfully challenged in *Board of Regents* and those agreements labelled "eligibility rules," yet none is apparent under the antitrust laws. In the alternative, the Court of Appeals may have intended to preclude only student-athletes from challenging eligibility rules under the antitrust laws. That approach would limit the reach of the opinion, but it would create an exception to the antitrust laws for which there is no basis in the statute or any other authority. In either event, the reach of the opinion, as it affects others, is a further reason for granting review.

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[10](...continued)
that a competitor is not entitled to challenge non-predatory pricing arrangements between a producer and its retailers under the antitrust laws.

II. THE RULE OF REASON CANNOT PROPERLY BE APPLIED TO ANALYZE AN AGREEMENT AMONG COMPETITORS WHERE THERE HAS BEEN NO DEVELOPMENT OF THE FACTS CONCERNING THE AGREEMENT'S COMPETITIVE EFFECTS.

The Seventh Circuit's dismissal of the claims in this case without any evidence on the competitive effects also raises an important issue regarding the proper application of the Rule of Reason. Petitioner's primary contention before the Circuit Court was that the district court, having acknowledged that the allegations of the complaint "posited a credible anticompetitive effect" to the NCAA Rules, Pet. App. 63a, acted improperly in declaring that the net impact of the Rules was procompetitive without any evidence on the Rules' actual operation. *Id.* at 10a. In affirming the entry of judgment, the Seventh Circuit not only rejected this objection, but conducted its own Rule of Reason analysis in which it made what are, in essence, factual findings that the NCAA Rules are essential to enhance competition, despite the absence of any evidence to support such a conclusion. *See supra* at 11-12. But neither court had any facts before it from which such a conclusion could be reached. The question was presented to the district court on a motion to dismiss, and the NCAA presented *no* evidence to support its claim that the Rules fostered competition -- much less to establish that they were essential to maintaining the identity of intercollegiate athletics as a unique product in the marketplace. *Board of Regents*, 468 U.S. at 114-15.[11]

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[11] As Judge Flaum observed in his dissent, there is a substantial debate over the credibility of the NCAA's claim that the no-draft and no-agent Rules are essential to defining college football as a distinct and viable product. *See* Pet. App. 36a. The attributes that identify college sports as a unique product to consumers are the fact that the athletes attend college and are not compensated in the same way as professional athletes. The no-draft and no-agent Rules do little, if anything, to preserve this identity. Indeed, the substantial contacts

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Determining the pro- and anticompetitive effects in this manner on a motion to dismiss was plainly contrary to the general requirement that all allegations must be taken as true on a motion to dismiss. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). More particularly, it is contrary to this Court's decisions concerning application of the Rule of Reason. The balancing of economic effects required under the Rule of Reason "necessarily involves an inquiry into the actual effect" of the challenged agreement. *Jefferson Paris Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). Such inquiry cannot be performed on a motion to dismiss, where there has been no factual development concerning such actual effects. In *Board of Regents*, the determination of whether the restraint on trade was reasonable was made after a "full trial," 468 U.S. at 95, and at numerous places this Court noted that its analysis was based on the fact that "evidence" supported the findings of the district court or that there was no evidence to support the claims of procompetitive effects urged by the NCAA. *Id.* at 114, 115, 116, and 119. Similarly, in *National Society of Professional Engineers*, 435 U.S. at 685, the Court observed that Rule of Reason cases involve "agreements whose competitive effect can only be evaluated by analyzing the facts pertaining to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692; *see also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (under the Rule of Reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"). Most recently, in *FTC v. Indiana Federation of Dentists*, the Court described that

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[11](...continued)
that the NCAA allows between student-athletes and professional sports seriously undermine its unsupported claim that these particular Rules are somehow essential to preserving amateurism. *See* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 Harv. L. Rev. 1301, 1308-12 (1992) (arguing that NCAA rules are invalid under Rule of Reason tests); Lock, *Unreasonable NCAA Eligibility Rules*, 20 Cap. Univ. L. Rev. 643, 650-52, 657-59 (1991) (same).

Rule of Reason case as involving "lengthy proceedings including a full evidentiary hearing." 476 U.S. at 451. In concluding that the restriction was unreasonable, the Court found that the FTC had properly rejected it because respondents had not introduced "sufficient evidence" to support it. *Id.* at 464.

The Seventh Circuit's contrary conclusion -- that the balancing required under Rule of Reason analysis can be conducted on a motion to dismiss -- presents a significant conflict with this Court's holding that antitrust claims should be resolved based on fact, not supposition. Just last Term in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2082 (1992), this Court stressed that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Antitrust claims should not be resolved on theory, the Court said, but by "focusing on the 'particular facts disclosed by the record.'" *Id.* (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925)). In *Kodak*, the Court upheld a decision reversing and remanding a grant of a motion for summary judgment in an antitrust case for further evidentiary proceedings, and even the dissenting Justices indicated that, if the claim had been brought under the Rule of Reason rather than as a *per se* challenge, further proceedings would have been necessary to properly determine the facts. *Id.* at 2092, and *id.* at 2101 (Scalia, J., dissenting). The Seventh Circuit's decision in this Rule of Reason case significantly undermines this principle, and encourages resolution of antitrust cases based on the presumptions of a particular court, rather than the actual effects of the restraint in the marketplace.

Indeed, the Circuit Court's decision seriously limits the utility and credibility of the Rule of Reason test by making its outcome dependent on the lower court's subjective assessment of the purpose and effect of agreements among competitors. In holding that the NCAA's Rules enhance competition as a matter of law, the majority repeatedly relied upon the avowed purposes of the NCAA's eligibility Rules as sufficient to demonstrate that these agreements

among competitors are not anticompetitive. *See, e.g.*, Pet. App. 16a, 19a-20a (citing NCAA statements of purpose and policy behind its rules as evidence of their impact). Such reliance on proclaimed purposes, rather than facts, is inconsistent with this Court's admonition that the NCAA's "good motives will not validate an otherwise anticompetitive practice." *Board of Regents*, 468 U.S. at 101 n.23. *Board of Regents* and other decisions of this Court make clear that, under the Rule of Reason, a defendant must demonstrate the challenged restraint does, in fact, benefit competition, and that its benefits cannot be achieved by a less restrictive means. *Id.* at 104, 114-15; *see also* Areeda, *The Rule of Reason -- A Catechism on Competition*, 55 Antitrust L. Rev. 571, 573, 578-79 (1986) (Rule of Reason calls for objective assessment of effects); *Association of Intercollegiate Athletics for Women v. NCAA*, 735 F. 2d 577, 583 & n.6 (D.C. Cir. 1984) ("competitive effect, not intent, determines civil liability"). The Seventh Circuit's resolution of this Rule of Reason case on a motion to dismiss, based on the defendant's unsubstantiated legal arguments concerning the purpose of its restraints, short-circuits the proper analysis and undermines the effectiveness of the antitrust laws as a protection against conspiracies to restrain trade.

CONCLUSION

For the reasons cited above, the petition should be granted.

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